Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 78-654

In the Supreme Court of the United States

OCTOBER TERM, 1978

BEN DeLUCA,

Petitioner,

vs.

HAROLD ROBERTSON, ELDRED SWANSON, EUGENE ATEN, SR., and MARVIN DANIEL, Individually and as Aldermen of the City of Franklin,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO.

BEN DeLUCA,

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VS.

HAROLD ROBERTSON, ELDRED SWANSON, EUGENE ATEN, SR., and MARVIN DANIEL, Individually and as Aldermen of the City of Franklin,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on September 19, 1978.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on September 19, 1978 and is set forth in the appendix, pp. App. 1. The decision of the United States District Court for the Eastern District of Wisconsin, Judge Myron L. Gordon, judge presiding, was entered at the conclusion of trial on August 23, 1977 and is set forth in the appendix, pp. App. 2-5.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is the claim of the petitioner under 42 U.S.C. Sec. 1983 barred by the doctrine of collateral estoppel or res judicata?

2. Has the appellant been denied due process of law and meaningful access to the courts in violation of his constitutional rights because of the application of Circuit Rule 35 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves 42 U.S.C. Sec. 1983, the Fifth Amendment to the Constitution of the United States and Circuit Rule 35 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE

The plaintiff was employed as the City Clerk of the City of Franklin from January, 1966 to September 5, 1972. On September 5, 1972 the defendants, Robertson, Swanson, Aten and Daniel, who were aldermen of the Common Council of the City of Franklin, introduced a resolution initiating proceedings to remove the plaintiff from his position. On that date the plaintiff was suspended from his duties by the defendant Starck who was the mayor of the City of Franklin. Between September 5, 1972 and September 25, 1972 the defendants Robertson, Swanson, Aten and Daniel conducted an investigation of the plaintiff and on

September 24, 1972 specific charges were filed against the plaintiff over the verification of the defendant Robertson, the president of the Common Council. Hearings were held on the charges on November 13, 14 and 15, 1972 and the defendants Robertson, Swanson, Aten and Daniel sat in judgment of the plaintiff as members of the six man hearing board. The defendant Robertson sat as chairman and presiding officer and made all procedural and evidentiary rulings. On January 3, 1973 the defendants Robertson, Swanson, Aten and Daniel entered findings and an order removing the plaintiff from his employment.

Plaintiff commenced this action pursuant to 42 U.S.C. Sec. 1983 by complaint filed October 11, 1974. On August 22 and 23, 1977 trial was held before the court. The evidence adduced by the plaintiff disclosed, inter alia, that prior to the initiation of the charges on September 5, 1972 the defendants Robertson, Swanson, Aten and Daniel had held a meeting at the home of the defendant Robertson for the purpose of considering the preparation of charges against the plaintiff; the defendant Aten had been the target of personal abuse and criticism of the plaintiff in that plaintiff had called the defendant Aten a liar in certain proceedings on the Common Council floor in the month next preceding the meeting at Alderman Robertson's home; the defendant Daniel as an attorney engaged in the active practice of law prior to September, 1972 had been employed by the plaintiff to perform legal services and the defendant Daniel unilaterally terminated his services with the plaintiff after the meeting at Alderman Robertson's home by letter to the plaintiff dated September 6, 1972. It was further established that the defendants signed the initiating papers and presented them at a Common Council meeting; that they conducted the subsequent investigation of the charges including interviews of prospective witnesses

which were tape recorded; that they hired special counsel to prosecute the case before them; that they withheld the interviews and the tape recordings from the plaintiff and his counsel; that they sat as a majority of the judicial body deciding the merits of the charges; that they ruled on all procedural objections; and that they made the findings resulting in the discharge of the plaintiff from his employment.

Testimony of the plaintiff established that the defendants had voted as a block repeatedly; that he had a dispute with defendant Robertson re allegations of bid rigging; that defendant Daniel had acted as plaintiff's attorney. The trial court took judicial notice of Sec. 66.77, Wis. Stats. 1971 which prohibited closed meetings of governmental bodies at the time of the meeting at Alderman Robertson's house prior to September 5, 1972.

Upon the motion of the defendants the trial court granted dismissal. An appeal from that decision was taken to the Circuit Court of Appeals for the Seventh Circuit and on September 19, 1978 the decision of the trial court was affirmed.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE ACTION WAS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL AND RES JUDICATA.

The unpublished order of the Court of Appeals concluded that the action was barred by the doctrine of res judicata because of a decision in the Wisconsin Supreme Court, *DeLuca* v. *Common Council,* 2 Wis. 2d 672 (1975). The Circuit Court of Appeals held that the Wisconsin Supreme Court decision had considered and resolved the issues propounded in the federal action. Applying the principles of res judicata and collateral estoppel of *Grubb* v. *Public Utilities Comm.*, 281 U.S. 470, *Blonder-Tongue Lab., Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 and *Lawlor* v. *National Screen and Service Corp.*, 349 U.S. 322, the Circuit Court found that no cause of action was made out — that the appellant had had a "full and fair" opportunity to resolve the issues in the state case.

It is respectfully submitted that the decision of the Wisconsin Supreme Court in *DeLuca* was not res judicata. Under the state law the Wisconsin Supreme Court was strictly confined on the appeal to a review of the record made during the administrative hearing. The observation of the Court of Appeals that matters in the evidence in the federal action were known to the appellant prior to the "state court proceedings and should have been presented at that time" is inaccurate in view of the Wisconsin procedural law. Although the petitioner may well have been aware of some of those facts there was no method whereby *he could introduce them* into the state court proceedings.

Review in the Circuit Court in Wisconsin and the subsequent appeal to the Supreme Court of Wisconsin was by state writ of certiorari and *strictly confined to the record* of the administrative hearing. *State ex rel. Weisskopf* v. *Byrne Bros.* (1924) 185 Wis. 237, 201 N.W. 372 and *State ex rel. Berger* v. *Cary* (1927) 192 Wis. 433, 211 N.W. 284.

It is respectfully submitted then that critical facts presented before the United States District Court were not and could not be presented in the state court. Those facts clearly went to the fundamental issue of whether or not the decision maker was biased under the doctrine announced in *Withrow* v. *Larkin* (1975) 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed. 2d 712.

II.

RULE 35 OF THE CIRCUIT RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AS APPLIED IS UNCONSTITUTIONAL.

An essential concomitant of due process of law is a resolution of the issues raised in such a manner as to instill confidence of the litigants in the integrity of the legal process. One of the methods of maintaining faith in this integrity is that the decisions reached by the appellate tribunals shall be subject to scrutiny within the process and utilized as precedent with respect to the issues resolved. With the enactment of a rule which prevents such scrutiny and declares the opinion to be of no precedential value some of the fundamental purposes served by the appellate process is undermined.

There can be no question but that the appellate courts retain inherent right to promulgate rules which expedite the appellate process, however, a rule which makes the decision a secret denies to the litigant due process of law

as guaranteed in the Constitution in the Fifth Amendment and impedes the right of meaningful access to the courts. *Missouri* v. *Lewis*, 101 U.S. 22; *Duncan* v. *Missouri*, 152 U.S. 377 and *Truax* v. *Corrigan*, 257 U.S. 316.

CONCLUSION

For the foregoing reasons stated above certiorari should be granted and the order of the United States Court of Appeals for the Seventh Circuit dated September 19, 1978 should be reversed.

Respectfully submitted,

ROBERT E. SUTTON
Attorney for Petitioner

APPENDIX

APPENDIX A

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
September 19, 1978

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. GUS J. SOLOMON, *Senior District Judge**

BEN DeLUCA,

Plaintiff-Appellant,

No. 77-2152 vs.

GORDON STARCK, individually and as Mayor of the City of Franklin, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 74-C-465
MYRON L. GORDON, *Judge*.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this court entered this date.

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* The Honorable Gus J. Solomon, Senior District Judge of the District of Oregon, is sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Heard: April 10, 1978
September 19, 1978
Before
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. GUS J. SOLOMON, *Senior District Judge**

BEN De LUCA,

Plaintiff-Appellant,

No. 77-2152 vs.

HAROLD ROBERTSON, ELDRED SWANSON, EUGENE ATEN, SR., and MARVIN DANIEL, Individually and as Aldermen of the City of Franklin,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 74-C-465
MYRON L. GORDON, *Judge*.

ORDER

Plaintiff Ben DeLuca is appealing an order dismissing his civil rights action charging a conspiracy to deprive him of his due process rights. The dismissal, occurring after a bench trial, was based on a finding of res judicata and failure to establish a prima facie case. A brief summary of the underlying facts is necessary in order to understand DeLuca's allegations and the district court's conclusions.

* The Honorable Gus J. Solomon, Senior District Judge of the District of Oregon, is sitting by designation.

DeLuca was employed as the City Clerk of the City of Franklin, Wisconsin, from January 1966 to September 5, 1972. On September 5, 1972, the defendants Robertson, Swanson, Aten and Daniel, who were aldermen of the Franklin Common Council, introduced a resolution initiating proceedings to remove DeLuca from his position. On that date the plaintiff was suspended from his duties. During the next three weeks the defendants conducted an investigation of DeLuca and on September 25, 1972 specific charges were filed against him. In November, three days of hearings were held on the charges, with these same defendants sitting in judgment of DeLuca as members of the six-man hearing board, and defendant Robertson sitting as chairman and presiding officer. On January 3, 1973, the defendants entered findings and issued an order removing DeLuca from office. DeLuca sought to have the Common Council's action reviewed by writ of certiorari in the circuit court for Milwaukee County. The writ was issued on July 2, 1973; and on January 21, 1974, following a hearing on the City of Franklin's motion to quash, the circuit court issued an order quashing the writ. On appeal the Wisconsin Supreme Court affirmed the lower court's decision. *DeLuca* v. *Common Council*, 72 Wis. 2d 672 (1975). This is the fifth of six actions which DeLuca has commenced against the City of Franklin or its officials.

It is well-settled that state courts have jurisdiction to decide federal constitutional issues except in specific areas where federal courts have exclusive jurisdiction. *Robb* v. *Connolly*, 111 U.S. 624. It is also indisputable that a state court decision on constitutional issues is res judicata as to an identical suit brought in a federal court. *Grubb* v. *Public Utilities Comm'n*, 281 U.S. 470. Thus to the extent that DeLuca's complaint raises the same issue decided by

the Wisconsin Supreme Court, *i.e.*, that the proceedings resulting in DeLuca's removal from office were constitutional, it is barred under the doctrine of res judicata. The Supreme Court of Wisconsin applied the test enunciated in *Winthrow* v. *Larkin*, 421 U.S. 35, to the aforementioned facts. It held that on the basis of the record the individual defendants had acted as an impartial tribunal notwithstanding the fact that they had participated both as investigators and adjudicators in the proceedings.

The doctrine of res judicata applies "not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end." 281 U.S. at 479. Therefore, the following facts going to the issue of the defendants' biases, which were presented for the first time in the district court, must be discounted. They were known personally to DeLuca prior to the state court proceeding and should have been presented at that time. They are: 1) the attorney-client relationship between DeLuca and defendant Daniel; 2) the matter of the bid-rigging charge made by DeLuca against defendant Robertson; 3) the personal dispute between DeLuca and defendant Aten concerning DeLuca's allegation that Aten was a "liar."

Other aspects of DeLuca's federal complaint are likewise barred by the doctrine of res judicata. For example, his assertion that he was prejudiced by being denied access to tapes and statements made by witnesses outside of his presence was previously considered by the Wisconsin Supreme Court. His inaibility to win a reversal on this point was due, in a large part, to his own failure in not having had the tapes and statements made a part of the record therein. 72 Wis. 2d at 695. He cannot now attempt to have those same tapes as the basis for another decision in the

federal court. On that issue he has already had his day in court. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313. Finally, his allegation that a secret meeting was held by the defendants prior to the initiation of charges on September 5, 1972, cannot be considered a "new" fact. The members of the Wisconsin Supreme Court were presumably astute enough to realize that the signatories of the original removal petition would have had to have met prior thereto in order to draft it.

DeLuca's complaint also includes a charge of conspiracy among the defendants in violation of 42 U.S.C. § 1983. Although this cause of action was not raised in the state court proceeding, our review of the record in this case, which includes the record of the state court proceedings, indicates that the facts and underlying legal contentions are substantially identical. DeLuca presented his federal challenges in the state court and the highest court of the state found the removal proceedings constitutional. DeLuca cannot add a "conspiracy" charge in an effort to make what was a constitutionally valid proceeding unconstitutional. *P. I. Enterprises, Inc.* v. *Cataldo*, 457 F.2d 1012 (1st Cir. 1972). Under the doctrine of collateral estoppel a judgment on the merits "precludes relitigation of issues actually litigated and determined on the prior suit, regardless of whether [the judgment] was based on the same cause of action." *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326. Having had a "full and fall" resolution in the state court, DeLuca is estopped from asserting a conspiracy in federal court.

Finding the matter barred under the doctrines of res judicata and collateral estoppel, it is not necessary to consider whether DeLuca established a prima facie case under 42 U.S.C. § 1983.

Accordingly, IT IS ORDERED that the judgment of the district court is AFFIRMED.

APPENDIX C

DECISION

Court: There are several matters before me now. The first is a motion as to an election. I deny that motion. I know of no justification for requiring the plaintiff to select whether these proceedings are for monetary or injunctive relief, or whether the claims against the several defendants are in official or individual capacity. It seems to me if the plaintiff were permitted to proceed, he could proceed on his complaint without delineation further than he has already made.

The motions—the other motion is to dismiss, and I have concluded that that motion should be granted all remaining defendants.

In my opinion, now that the plaintiff's case is in, it is clear that the Court should have granted the pretrial motion for dismissal on the grounds of res adjudicata. I denied that grounds at the time the motions were made because of the existence of conspiracy allegations, and I was loath to foreclose the plaintiff from showing some type of complicity and chicanery which, theoretically at least, could have been incorporated within the representations of conspiracy, which I did not find in the *DeLuca* case reported in 272 Wis. 2d 672.

The plaintiff's case is now in and I am persuaded that there is no significant divergence between the charges made in the matter at bar and those made in the prior proceedings which have been fully adjudicated and are reflective in the decision of the Wisconsin Supreme Court.

In that case, the contention was advanced that Mr. DeLuca was denied procedural due process because of the nature of the hearing. The *Withrow* v. *Larkin* matter was argued and heard and resolved by the Wisconsin State

Supreme Court in a judgment adverse to Mr. DeLuca. His present contention that somehow the proof that he has advanced here is significantly different than that adduced in the earlier State Court proceedings is not impressive.

I recognize that Mr. DeLuca had a very significant interest in his employment, and I do not lightly ignore his claim that he was entitled to protections in resolution of his right to continued employment or, alternatively, before he could be lawfully discharged.

I have carefully considered the past legal proceedings, and I believe I have given careful attention to the testimony that has been adduced at this trial, and giving Mr. DeLuca all the favorable intendments which the law awards to a plaintiff on a motion to dismiss, at the conclusion of the plaintiff's case I am unable to accept Mr. DeLuca's contention that he has made out a prima facie case. I believe he was indeed afforded reasonable due process. It may be that mistakes were made by the defendants in not, for example, turning over the tapes. I do not regard those errors as arising to the dignity of being a denial of constitutional due process.

Withrow against Larkin makes it very clear that in the absence of significant showing of conflict of interest of personal animosity, the inquiry by a Board does not have to be conducted by individuals who are totally devoid of interest and previous knowledge.

The Alderman were vested with the burden of resolving their personnel problem, and to deny them the right to adjudicate that question because several of them had discussed this problem or because one of them had represented Mr. DeLuca in the legal matter, or for any of the other reasons advanced by Mr. DeLuca in the course of his testimony, is, in my judgment, unwarranted.

I believe that there has been no showing of such perversity of attitude by the defendants to consider that the conduct of the members of the Board sitting in the quasi-judicial capacity was such that it could be labeled tainted, or that it denied to plaintiff his due process rights.

It follows that the defendants have a right to investigate and to decide, and having done so with reasonable notice to Mr. DeLuca, his claim of a denial of due process is unsubstantiated, and I repeat that I have, I believe I have given him all the favorable inferences to which he might be entitled because of the timing of the defendants' motion.

So, on two grounds, (1) is that I think he simply failed to produce a prima facie case; and, secondly, on the grounds that his claim is res ajudicata.

The Court grants the defendants' motion to dismiss, and the plaintiff's action is dismissed, and judgment will enter dismissing the plaintiff's complaint.

These remarks will constitute my findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

APPENDIX D

DOCKET ENTRIES

10/11/74	Complaint filed; summons issued.
10/17/74	Marshal's return of service. Complaint and summons served on all defts. 10/15/74.
11/ 8/74	Defts' Answer.
9/18/75	Status Report (MLG) Status Report set in October 1975.
10/15/75	Status Report (MLG) Motion to dismiss may be forthcoming. Court set deadline for motion and supporting brief—within 30 days. Another status report set after resolving motion.
11/14/75	Exhibit B—Record Pagges 1-117 From State of Wis. ex. Rel. Ben De Luca v. The Common Council of the City of Franklin (Milwaukee Circuit Court Case No. 411-337.
11/14/75	Transcript—Before The Common Council of the City of Franklin Nov. 13, 14, and 15, 1972.
11/14/75	Ex. E—Exhibits from State of Wis. Ex. Rel. Ben DeLuca v. The Common Council of the City of Franklin (Milwaukee circuit Court Case No. 411-337).
11/14/75	Deft's Motion to dismiss and motion for summary judgment, with affidavits and brief.
11/28/75	Brief of the Pltf. in opposition to the motions of the defts. to dismiss or for summary judgment.
12/15/75	Defts' Reply Brief in Support of Motion to dismiss and Motion for summary judgment.

3/10/76 Decision and order (MLG) denying defts' motions to dismiss and for summary judgment, except as to the City of Franklin, whose motion to dismiss is granted.

/ 9/76 Status Report (MLG) Pre-trial set at end of September.

9/ 7/76 Defts' Amended Motion to dismiss, or in the alternative, for summary judgment.

9/ 7/76 Defts' Brief in support of amended motion to dismiss, or in the alternative, for summary judgment.

9/21/76 Brief of Pltf. in opposition to the deft's amended motion to dismiss or in the alternative, for summary judgment.

10/ 7/76 Defts' Reply Brief in support of the amended Motion to dismiss or in the alternative, for summary judgment.

12/17/76 Decision and order (MLG) denying defts' amended motions to dismiss, and, alternatively for summary judgment.

4/29/77 Pre-trial conf. (MLG) Final pre-trial on 8/15/77 at 9:30 AM. Court trial on 8/22/77 at 10:00 AM Jury?.

8/12/77 Final Pre-trial Report of the Plaintiff.

8/15/77 Defts' Motion to amend Answer. (see below for judge's ruling)

8/15/77 Final Pre-trial conf. (MLG) Court trial set on 8/22/77 at 11:00 AM.

8/18/77 Defts' motion to amend answer—granted, but all added allegations and defenses are deemed controverted by the pltf. /s/ MLG 8/18/77.

8/22/77 Trial by the court commenced; contd. and concluded on 8/23/77. Court denies defts' motion for election. Court grants defts' motion to dismiss as to all remaining defts and orders pltf's action dismissed.

8/23/77 Judgment entered—copy mailed to the parties on 8/23/77.

9/ 9/77 Costs taxed against pltf. in the sum of $161.10—copy of Bill of Costs given to the parties.

9/20/77 Plaintiff's Notice of Appeal to the USCA, 7th Circuit, from judgment entered on 8/23/77—copy mailed to defts' counsel on 9/21/77.

9/21/77 Copy of Notice and docket entries mailed to the US Court of Appeals, 7th Circuit.

10/19/77 Letter from appellant complying with Circuit Rule 4a, 7th Circuit, Court of Appeals.

10/26/77 Petn. and order (MLG) extending time until 11/15/77 for transmission of the appeal record.

11/15/77 Petn. and order (MLG) extending time until 11/22/77 for transmission of the appeal record.

11/22/77* Transcript of Proceedings upon Trial to the Court (Vol. I) pages 1-155).

11/22/77* Transcript of Proceedings upon Trial to the Court (Vol. II) pages 156-327)

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* Included separately from the bound record.

Clerk's Certificate.

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Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Appeals for the 7th Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-654

BEN DeLUCA,

Petitioner,

vs.

HAROLD ROBERTSON, ELDRED SWANSON, EUGENE ATEN, SR., and MARVIN DANIEL, Individually and as Aldermen of the City of Franklin,

Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Appeals for the 7th Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

1. In this action under 42 U.S.C. 1983, did the petitioner make out a prima facie case showing that he had been denied Due Process at the hearing which resulted in his discharge for cause from public employment?

2. Should the decision of the Wisconsin Supreme Court that the petitioner was afforded Due Process of law and an impartial decisionmaker be given "full faith and

credit'' in the federal courts pursuant to the provisions of 28 U.S.C. 1738?

3. Is the petitioner's action barred by res judicata?

STATEMENT OF THE CASE

The petitioner served as the Clerk of the City of Franklin from January 16, 1966 until September 5, 1972. City officials, such as the petitioner, who are appointed by the Mayor and subject to confirmation by the Common Council, can be removed from office only for cause upon the affirmative vote of three-fourths of all of the members of the Commons Council. *Wis. Stats. Sec.* 17.12(1) (c)&(d) Any resident and taxpayer of the city may initiate removal proceedings. The Common Council is then required to investigate and hear the charges, but may first require the complainant to post a bond for costs. *Wis. Stats. Sec.* 17.16(3)&(4)

On September 5, 1972, the respondents, four of the six aldermen of the city, introduced a petition to initiate removal proceedings. The Mayor suspended the petitioner from office pending the outcome of the hearing and appointed the Common Council as a committee of the whole to investigate the charges. The respondents, Marvin Daniel, an attorney, and Harold Robertson, the President of the Council, assumed the primary responsibility for the investigation. (Tr. pp. 196-199) On September 25, 1972, the President of the Common Council filed formal charges against the petitioner. (Ex. 155, pp. 81-83) These charges were verified as required by statute. *Wis. Stats. Sec.* 17.16(3)

The removal hearing was held on November 13, 14 and 15, 1972. Immediately prior to the commencement of the hearing, the petitioner submitted a written motion to disqualify the four respondents on the ground that they had signed the petition to initiate removal proceedings. The petitioner also moved to disqualify the respondent, Harold Robertson, on the additional ground that he had filed the formal charges. (Ex. 155, pp. 98-99) This motion was denied.

On January 3, 1973, the Common Council submitted its Findings of Fact and Conclusions of Law and ordered the petitioner removed from office. (Ex. 5) All six of the aldermen initially voted to remove Mr. DeLuca from office, but Alderman Januszewski abstained from the final vote for reasons undisclosed by the record. (Tr. pp. 237-239)

The petitioner sought review of his discharge by way of a common law writ of certiorari in the Circuit Court of Milwaukee County. In a lengthy 21 page petition, Mr. DeLuca alleged numerous violations of state law, the Wisconsin Constitution, and the Constitution of the United States of America. (Ex. 155, pp. 1-21) On January 21, 1974, the Circuit Court of Milwaukee County entered an order quashing the writ. Mr. DeLuca appealed to the Wisconsin Supreme Court. While that appeal was pending, Mr. DeLuca commenced this action. On June 2, 1976, the Wisconsin Supreme Court affirmed the order quashing the writ of certiorari. *State ex rel. DeLuca* v. *Common Council*, 72 Wis.2d 672, 242 N.W.2d 689 (1976)

The trial of this action was held on August 22 and 23, 1977. At the close of petitioner's case, the District Court granted the respondents' motion to dismiss on the grounds that the petitioner had failed to make a *prima facie* case and on the alternative ground that the action was barred by res judicata. The United States Court of Appeals of the Seventh Circuit held that the action was barred by the

principles of res judicata and collateral estoppel without deciding whether the petitioner had made out a *prima facie* case.

The petitioner has commenced five actions in the state courts challenging the propriety of the procedures leading to his suspension and eventual discharge from office. Four of these actions have been dismissed. One action is still pending in which the petitioner claims that the respondents and Alderman Mayer defamed him by publishing the Common Council's Findings of Fact and Conclusions of Law. (Ex. 156-166, Tr. pp. 63-65)

WHY THE WRIT SHOULD BE DENIED

I.

THE PETITIONER FAILED TO MAKE OUT A PRIMA FACIE CASE

The petitioner must not only show that the Court of Appeals misapplied the doctrine of res judicata but also that he has made out a *prima facie* case in order to overturn the dismissal of his action. The petitioner does not make any argument in support of his suggestion that the District Court erred in determining that he failed to make out a case. The petitioner's Statement of the Case omits a number of salient facts, such as the petitioner's opinion that the defendants tended to vote as a block is unsupported by the Common Council minutes (Ex. 182-189), *Wis. Stats. Sec.* 66.77 (1971), the Wisconsin's Open Meeting Law, was a directory statute which did not provide for any penalties for its violation, the respondents had a right to commence removal proceedings because they were citizens and taxpayers, and not because they were public officials, and the petitioner did not think any of the aldermen were biased except Alderman Robertson. The petitioner felt that Alderman Robertson was biased only because of some dispute in 1970 or 1971 over the specifications for an electrical generator. (Tr. pp. 17-18, 129-132)[1]

[1] On July 15, 1977 the petitioner testified that the city never purchased the generator. He swore at the trial on August 22, 1977 that the Common Council approved the purchase of the generator despite his objections. (Tr. pp. 119-120, 125)

II.

THE ACTION IS BARRED BY RES JUDICATA

The petitioner correctly asserts that the Wisconsin Supreme Court was "confined . . . to a review of the record" of the administrative proceeding. The petitioner would have a legitimate grievance if the Wisconsin Supreme Court had decided his case on the basis of facts outside of the record. The petitioner, however, is simply wrong in asserting that state procedures precluded him from raising any constitutional issue. The Common Council never prevented the petitioner from making any motion or raising any objection to its procedures. Any alleged violation of Due Process may be reviewed by a common law writ of certiorari. *State ex rel. Wasilewski* v. *Board of School Directors*, 14 Wis.2d 243, 263, 111 N.W.2d 198 (1961) The petitioner's present complaint about the inadequacy of state procedures is somewhat inconsistent with his previous actions in commencing five suits in the state courts.

The petitioner was not denied a full and fair hearing in the state courts because the Wisconsin Supreme Court refused to consider some of his objections which were made long after the removal hearing. Neither state nor federal law permits the disqualification of a decisionmaker for reasons that were known, or should have been known, but were never advanced at the original hearing. *Duffield* v. *Charleston Area Medical Center, Inc.*, 503 F.2d 512, 515-16 (C.A. 4, 1974); *Lloyd A. Fry Roofing Co.* v. *F.T.C.*, 371 F.2d 277, 286 (C.A. 7, 1967) Nevertheless, the Wisconsin Supreme Court did consider some of the petitioner's objections which were first asserted after the removal hearing. The Court said:

> On appeal to this court, it was claimed for the first time that some of the aldermen should have been disqualified because they were involved in personal disputes with DeLuca. This objection was not timely raised and will not be dealt with.
>
> It should also be pointed out that DeLuca claimed, for the first time in his petition for a writ of certiorari, that the two aldermen, Robertson and Daniel, had investigated the charges and they, therefore, were disqualified from further proceedings. These objections which were not made at the removal hearing cannot be made for the first time in the court proceedings on certiorari. We discussed the contention only because the issue is one of probable continuing public interest. (72 Wis.2d at 692)

The petitioner has had his day in court on all the issues that were raised or could have been raised in the Wisconsin Supreme Court despite that court's refusal to discuss the merits of some of the issues because of the petitioner's procedural defaults. *Mertes* v. *Mertes*, 411 U.S. 961, 93 S.Ct. 2141, 36 L.Ed.2d 681 (1973) (Summarily affirming decision of three-judge court, 350 F.Supp. 472 [D.Del. 1972])

III.

THE PETITIONER IS COLLATERALLY ESTOPPED FROM RELITIGATING THE ISSUES RAISED IN THE COMPLAINT

The petitioner has claimed that this case involves a different cause of action for the purposes of res judicata because of the presence of a new allegation that the defendants were "acting in concert". A cause of action is usually more broadly defined for the purposes of res judicata than for the purposes of pleading. Even if one were to indulge in the dubious assumption that this case involves a

different cause of action for the purposes of res judicata, the present action would still be barred by the doctrine of collateral estoppel. The Wisconsin Supreme Court determined that the petitioner had been afforded Due Process and specifically held that the Common Council was an impartial decisionmaker.

IV.

THE PETITION DOES NOT PRESENT ANY IMPORTANT FEDERAL QUESTION

Some courts have been hesitant to hold that a civil rights action is barred by res judicata where the state litigation was involuntary as to the plaintiff or where the constitutional issues could have been raised in the state courts but were not. e.g. *Thistlethwaite* v. *City of New York,* 497 F.2d 339 (C.A.2, 1974), cert. den. 419 U.S. 1093, 95 S.Ct. 686, 42 L.Ed.2d 686; *Lombard* v. *Bd. of Ed. of City of New York,* 502 F.2d 631 (C.A.2, 1974), cert. den. 420 U.S. 976, 95 S.Ct. 1400, 43 L.Ed.2d 656; cf. *Blankner* v. *City of Chicago,* 504 F.2d 1037 (C.A.7, 1974) cert. den. 421 U.S. 948, 95 S.Ct. 1678, 44 L.Ed.2d 101; reh. den. 422 U.S. 1029, 95 S.Ct. 2618, 45 L.Ed.2d 686; *Scoggin* v. *Schrunk,* 522 F.2d 436 (C.A. 9, 1975), cert. den. 423 U.S. 1066, 96 S.Ct. 807, 46 L.Ed.2d 657.

In contrast, this petitioner has freely elected to commence several actions in the state courts where he relied upon both the State and Federal Constitutions. This action would be barred even if one were to adopt the most restrictive view as to the proper application of res judicata in civil rights actions. The petitioner does not claim that the Circuit Court of Appeals' decision conflicts with a decision from any other Circuit. The petitioner's claim that he was denied a fair trial in the state courts is refuted by the record. The petitioner does not advance any other reason

why this action should not be barred by res judicata or why the decision of the Wisconsin Supreme Court should not be given "full faith and credit" in the federal courts pursuant to 28 U.S.C. 1738. The present action is a wholly inappropriate vehicle to resolve any possible inconsistencies between the opinions of the various Circuit Courts of Appeals.

V.

THE PETITIONER SHOULD NOT BE AFFORDED STANDING TO ATTACK RULE 35 OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Rule 35(d)(3) of the United States Court of Appeals for the Seventh Circuit provides:

> Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for disposition of appeals as set forth in this rule.

The petitioner never made a motion to have the decision printed and should not be afforded standing in this Court to complain. It is immaterial to respondents, part time public officials, whether the decision is published. No case or controversy exists between the parties in respect to the validity of Rule 35. The petitioner's dispute is with the Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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